No. 15,296

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHFIELD OIL CORPORATION, a corporation,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

On Appeal from the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Attorneys, Admiralty and Shipping Section,
Department of Justice,
Attorneys for Appellee
United States of America.

GRAYDON S. STARING,
GEORGE JAFFIN,
Of Counsel.

Subject Index

Table of Authorities Cited

Codes

Rules

Texts

No. 15,296

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHFIELD OIL CORPORATION, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court rests upon 28 U.S.C. 1291 by reason of a notice of appeal filed September 17, 1956 (R. 56-57), from the decree of the United States District Court for the Southern District of California, (R. 55-56)[1] Honorable Ben Harrison, United States District Judge, sustaining, without opinion, the Government's exceptions and dismissing the libel.

---

[1]An appeal by libelant from a prior related case was determined by this Court in 207 F. 2d 864.

The jurisdiction of the District Court was invoked under the Suits in Admiralty Act (46 U.S.C. 742) by an amended libel (R. 3-25), which sought recovery of $34,158.02, alleged to have been obtained by duress in connection with the settlement of claims arising from charters of libelant's vessels during World War II. The Government's exceptions and exceptive allegations which were sustained by the District Court, alleged that the libel failed to state a cause of action because the libel alleged a voluntary payment made by libelant to obtain the benefit of a compromise settlement of disputed claims (R. 27-38).

QUESTIONS PRESENTED.

1. Whether under the allegations and exhibits of the amended libel Richfield may prove an asserted prior telephonic agreement that it could make payment of the Government's compromise offer under protest and sue to recover it back.

2. Whether payment by Richfield of the Government's compromise offer was under duress, and hence recoverable, where alleged to be induced by the Government's threat of withholding, offset and litigation.

COUNTERSTATEMENT OF THE CASE.

Pursuant to Rule 18(3) of this Court, the Government presents the following counterstatement of the case because it controverts libelant's statement as

unsupported by the record in respect of the alleged reservation of rights and duress.

This Court, in its opinion in the previous case, (207 F. 2d 864) has fully reviewed the transactions from which the instant litigation arose: the charter agreements (207 F. 2d at 866), the renegotiation contract (p. 867), the reaudit by the Maritime Commission (p. 867) and the claim approximating $75,000 which was originally asserted by the Government (p. 868). On the basis of these facts, this Court held that the Government's threats of withholding and setoff or litigation did not constitute duress (pp. 870-871). It is sufficient to summarize the subsequent settlement negotiations, expressly embodied in correspondence between counsel for Maritime and Richfield and to contrast the actual texts of the letters exhibited with the pleadings with the allegations and assertions by libelant in its brief.

THE CORRESPONDENCE EXHIBITED WITH THE PLEADINGS.

On January 27, 1954, counsel for libelant advised Maritime that it would not appeal this Court's decision (Exhibit N, R. 43-44). By letter dated January 28, 1954 he stated that after checking the Maritime auditor's figures, Richfield would "in all probability make payment under protest as a preliminary step to suing for recovery unless some satisfactory compromise settlement based upon such revised billing can be worked out" (Exhibit O, R. 44-45).

By letter dated May 10, 1954, Maritime's district counsel replied offering compromise on the same 55-45 percent formula applicable to other companies. The letter concluded: "Settlement on that basis necessarily would preclude any payment under protest and recourse to the courts thereof." (Exhibit Q, R. 47-49.) Relative to the proposed compromise on these terms, Maritime's district counsel sent supplemental letters on August 31, 1954 and September 9, 1954 (Exhibits R and S, R. 50-53).

Maritime's General Counsel Morse, at Washington, by letter dated September 22, 1954, advised Richfield's counsel that his company's counterproposal for settlement for some amount between $20,000 and $24,427 in exchange for a complete release by the Government of all claims was unacceptable (Exhibit "AA", R. 30-31). Richfield's proposal was rejected on two grounds: first, Maritime's settlement formula had already been accepted by the three other West Coast oil companies against which Maritime had similar claims; second, it was not customary for the Government to give broad releases from liability in connection with the settlement of an individual claim.

Richfield's counsel replied by letter dated September 30, 1954, admitting (presumably in the light of this Court's decision at 207 F. 2d 870) "we would not be able to pay under protest and sue for recovery." After stating Richfield's preference for an administrative settlement, he concluded: "Accordingly we would be willing to pay a substantial sum and dismiss

our action in the Court of Claims for a complete release." (Exhibit "BB", R. 34-35.)

Maritime's General Counsel Morse replied on October 29, 1954, repeating interest in an amicable settlement and reiterated that the Government was not in a position to give an overall release. Reference was made to this Court's opinion in Richfield's prior case as disposing of the company's contention as to renegotiation. Richfield's counsel was requested to advise whether he was prepared to adopt the compromise reached with the other West Coast companies (Exhibit "CC", R. 36-38).

Settlement negotiations came to a head when Maritime's General Counsel, by letter dated July 25, 1955 (Exhibit K, R. 21-24), rejected Richfield's offer to pay $20,000 in full settlement of all claims and refused to depart from the common terms of settlement offered to and accepted by the other West Coast oil companies against which the Government had similar claims. The alleged duress relied upon by Richfield is founded on this July 25, 1955, letter of Government counsel which concluded (R. 24):

> Accordingly, unless we receive word from your company within 30 days that you are prepared to accept settlement of the manning watch overtime on the 55-45 formula agreed to by the other West Coast oil companies and to accept the other WSA charter claims of the Administration in the above-mentioned total sum of $34,-158.02, *the Administration will have no other recourse except to institute suit or effect set-off*

> *against sums due your company from* the Government as may be appropriate. [Emphasis supplied]

Richfield's counsel replied by letter, dated August 26, 1955 (Exhibit K, R. 18-21) enclosing Richfield's check for $34,158.02, representing "payment under protest" of the Government's claim. Payment was protested on various grounds, all of which were before this Court on the prior appeal (207 F. 2d 864) (Exhibit K, R. 18-21).

No statement was ever made in the letters that the payment under protest was being made on the condition that the Government agree that Richfield might sue to get it back contrary to this Court's holding at 207 F. 2d 870. The foregoing letters, which were carefully drafted by the lawyers for each side, provide an *accurate and contemporaneous picture of what actually transpired* at the time of the payment under protest. These indisputable documents in the record are to be contrasted with the contrary allegations and assertions more recently made by Richfield in its opening brief in this Court and in certain conclusionary assertions in its amended libel.

RICHFIELD'S AMENDED LIBEL.

The amended libel's first cause of action alleges the transactions, already reviewed in this Court's opinion (207 F. 2d 864) which gave rise to the instant litigation: the charter parties (R. 5), the disputes

as to overtime (R. 6-8) the reaudit by the Government (R. 10), and Maritime's original claim against Richfield approximating $75,000. After reference to this Court's previous decision (R. 11), the libel relates the settlement negotiations (R. 11), the Government's demand of payment in full, and the alleged threat that if payment was not made within 30 days the sums would be recovered "by the employment of the summary procedure of offset or an [sic] institution of litigation" (R. 12). It then alleges that under compulsion of the Government's "coercion, duress and threats," and "for the purpose of preventing such seizure of its property" Richfield paid under protest, as evidenced by its letter of August 26, 1955 (R. 13).

The second cause of action repeats the foregoing allegations (R. 13-14) and further realleges the renegotiation contract and Government reaudit (R. 14-16). It concludes that the Government's claim was "collected under duress" as a result of the "demands and duress" and that by reason of "said payment under protest required thereby" the Government has been unjustly enriched under these charter parties in the amount of $34,158.02 (R. 16-17).

Nothing is alleged in either cause of action which will support Richfield's present contention that there was an agreement between the parties to permit Richfield to pay under protest the $34,158.02 compromise amount on account of the Government's $75,000 claim and then bring this suit to recover it back. On the contrary, Exhibit K to the libel containing Maritime's letter of July 25, 1955 giving Richfield's counsel the

three alternatives of compromise settlement, set-off or litigation (R. 21-24), and Richfield's letter of August 26, 1955, replying by payment under protest, shows there was no such condition attached by Richfield to the protested payment.

THE EXCEPTIONS AND EXCEPTIVE ALLEGATIONS.

The Government's exceptions and exceptive allegations referred to Maritime's original demand of $75,000, reduced to a compromise offer of $34,158.02, based upon the 45-55 percent compromise settlement formula referred to in the July 25, 1955 letter (Exhibit K) as offered to all West Coast oil companies (R. 27-28). Additional background correspondence relating to the compromise negotiations (Exhibits "AA", "BB" and "CC") was presented showing the circumstances in which Richfield paid the compromise offer of $34,158.02. The exceptions concluded that Richfield's payment constituted a voluntary payment, was not under duress and was not recoverable (R. 28-29).

RICHFIELD'S "ANSWER" TO THE EXCEPTIONS AND EXCEPTIVE ALLEGATIONS.

Instead of filing the usual affidavit in opposition to the exceptive allegations, Richfield filed a document which it entitled "answer to respondent's exceptions and exceptive allegations to the amended libel" which exhibited the remainder of the correspondence (R. 38-39). This "answer" presented new argumentative

allegations which, it asserted, "clearly show that one of the grounds establishing the involuntary nature of the payment is that the payment was made under an express reservation of the right to pay under protest and sue for recovery" (R. 39). It referred again to this Court's previous decision and the settlement negotiations as reflected in the correspondence (R. 39-41) and to Maritime's letter of May 10, 1954 (Exhibit Q to the "answer") which specifically stated that compromise on the 55-45% basis "necessarily would preclude any payment under protest and recourse to the Courts for recovery thereof" (R. 49).

Richfield's "answer," after asserting that the settlement negotiations culminated in the Government's final letter of July 25, 1955 (Exhibit K, R. 21-24), which gave Richfield 30 days to choose between the alternatives of compromise settlement, set-off, or being sued, then asserts that before Richfield's payment by letter of August 26, 1956, there was a prior telephone conversation with Maritime's counsel, Pimper, and continues as follows (R. 42):

> "* * * Shortly before expiration of the thirty-day period set forth in said letter from Mr. Pimper, counsel for libelant telephoned Mr. Pimper and advised that if respondent would recede from its position stated by the District Counsel, that payment under protest would not be accepted, libelant would pay the claim under protest to prevent the threatened offset and would institute suit to recover. This Mr. Pimper agreed to do, whereupon, *reserving the right to sue for recovery, libelant made the payment under protest to prevent seizure of its property.*"

This assertion, of course, is directly contrary to the terms of Richfield's letter of August 26, 1955, accompanying the payment under protest, which was written after the foregoing asserted telephone conversation (Exhibit K, R. 18-21). The August 26, 1956, letter merely stated payment of the compromise amount was made under protest.

THE ORDER DISMISSING THE AMENDED LIBEL.

Richfield did not seek leave to further amend its libel to add thereto allegations corresponding to the assertions in its "answer" that there was a prior telephonic agreement contrary to its letter of August 26, 1955 (Exhibit K to the Amended Libel, R. 18-21) under which the Government agreed to accept the payment under protest of the compromise amount for the purpose of letting Richfield sue the United States instead of the United States suing Richfield. Instead, the order of dismissal expressly recites (R. 55-56) that——

> * * * the Court determining that the exceptions are well taken and the Court having advised Proctor for Libelant that if desired Libelant might file an amended Libel, and the Proctor for Libelant advising that upon stipulation of the parties the exceptions and exceptive allegations and the answer of Libelant to the exceptions and exceptive allegations would be a part of the record on appeal that Libelant did not desire to file an Amended Libel. * * * the exceptions are sustained and the amended libel dismissed.

It is from that order that this appeal is taken.

SUMMARY OF ARGUMENT.

I. *Richfield's amended libel does not allege any agreement that it could voluntarily pay the amount of the Government's compromise offer under protest and then sue to recover it back.*

Richfield's amended libel is limited to claiming payment under protest. If it was Richfield's intention to claim payment under a prior telephone agreement giving it the right to sue, such claim should have been embodied in its libel and, at the very least, included in its letter transmitting payment of the compromise amount under protest. Richfield's payment of the compromise settlement proposed by the Government was not conditioned upon any reservation of a right to sue for recovery. Consequently, Richfield's authorities are inapplicable because the facts in this case, unlike those relied on by Richfield, show no agreement reserving a right to sue for recovery back.

II. *This Court's previous Richfield decision establishes that payments under threat of withholding and offset by the Government are voluntary and not recoverable.*

Richfield's amended libel fails to allege any facts constituting duress as a matter of law and its conclusionary allegations of duress are contrary to the terms of the exchange of correspondence forming Exhibit K (R. 18-25) and are not admitted but instead are contradicted by the exceptions and exceptive allegations. The facts as they appear show that no seizure of Richfield's property was threatened, but only that the Government might withhold money otherwise owed

to libelant or bring suit against Richfield to enforce its $75,000 claim.

Richfield's payment of the $34,158.02 compromise settlement proposed by the Government was thus, as a matter of law, not under duress but voluntary and hence not recoverable. Such voluntary payment was not rendered recoverable merely because it was made under protest, and in consequence of the Government's threat to sue or withhold and because Richfield considered payment the lesser evil. Authorities dealing with actual duress by seizure of goods, which Richfield invokes, are not applicable to threats of withholding payment of moneys due, which is the whole of the facts in the case at bar.

ARGUMENT.

I.

RICHFIELD'S AMENDED LIBEL DOES NOT ALLEGE ANY AGREEMENT THAT IT COULD VOLUNTARILY PAY THE AMOUNT OF THE GOVERNMENT'S COMPROMISE OFFER UNDER PROTEST AND THEN SUE TO RECOVER IT BACK.

If, as is now asserted in Richfield's brief (pp. 6, 8, 18, 21, 23, 24) payment of the Government's compromise offer was made under a prior telephonic agreement expressly reserving the right to sue to recover the payment back, it should have been alleged in the amended libel or a further amendment filed. Moreover, presumably the agreement would be stated in the later letter of August 26, 1955, forwarding the pay-

ment under protest (Exhibit K, R. 18-21). In the present state of the record Richfield refused to amend and now has no right to raise the point at all. Even if it could raise it, still it is contrary to the later written agreement in the record.

The letter of August 26, 1955, merely states that payment is made under protest (R. 18-21). Nothing is said as to any agreement with Government counsel as to reservation of rights to sue. The amended libel itself, as previously indicated, makes repeated allegations (R. 13, 14, 17) of "duress" and payment "under protest", but nothing of an agreement for suit. This payment under protest is expressly related to Exhibit K, the letter which covered it (R. 18-21), yet nothing is said in Exhibit K concerning any agreement with reservation of rights to sue.

As late as June 4, 1956, when the amended libel was filed, libelant consistently adhered to its sole theory of payment under protest. The fatal weakness in libelant's present position is that the record, which shows the steady course of correspondence between the parties (*supra,* pp. 3-6), fully reflects their contemporaneous understanding that there was no agreement that Richfield might pay the compromise and then sue. To attempt at this late stage to graft upon that correspondence an asserted prior contrary *telephonic* understanding, to which Government counsel is supposed to have agreed, whereby Richfield was given the right to sue, is an afterthought of counsel only designed to avoid the normal operation of the voluntary payment rule.

Moreover, Richfield's belated attempt to rely upon the alleged prior telephone conversation is frustrated by the parol evidence rule. Richfield's letter of August 1955 (Exhibit K, R. 18-21) transmitting the $34,000 compromise payment in accordance with Maritime's 55-45 formula was accepted by the Government in accordance with its written terms, thereby establishing the settlement agreement and merging prior negotiations and conversations. This letter agreement cannot now be varied by parol evidence as to prior telephone negotiations. See *Bernheimer v. First National Bank,* 78 F. 2d 139 (C.A. 9, 1935), certiorari denied, 296 U.S. 639; *Murphy v. Craig,* 28 F. 2d 963 (C.A. 9, 1928); *Kaplan v. American Cotton Oil Co.,* 12 F. 2d 969 (C.A. 5, 1926).

Inasmuch as the parties were dealing at arm's length and were both represented by legal counsel, Richfield's counsel should have followed the example of similar parties in the *Ohio Oil, New York R.R., Lobit* and other cases, which he now invokes, and expressly included in the correspondence a written condition of Richfield's right to sue for recovery back. If this right was so vitally needed at the time of the conclusion of the settlement negotiations, it was far more important for Richfield's letter of August 26, 1955, to have stated that payment might only be retained by Maritime if it agreed to the express reservation of rights to sue than that it say, as it actually did, that payment was made under protest. Absent such an agreement, Richfield's present reliance on those cases is footless.

Counsel's attempts to twist its authorities to reach the actual facts of this case, where there was no such agreement, avail it nothing. It may first be noted that the quotation in Richfield's brief (p. 23) from the summary of the law appearing in 70 Corpus Juris Secundum omits statements which defeat recovery in the case at bar. With specific reference to the reservation of rights the full statement in 70 Corpus Juris Secundum, § 144, p. 349, continues as follows:

> *Reservation of rights.* A payment made with the express reservation of the right to recover it by suit has been held to authorize a recovery thereof. *It has also been held, however, that a voluntary payment made without coercion, duress, compulsion, or fraud may not be recovered notwithstanding the payor made such payment on the express condition that he did not waive any rights that he may have had to recover it.* [Emphasis added]

Similarly, the statement, of which Richfield's other quotation is only the last sentence, contains the following in 70 Corpus Juris Secundum, sec. 153, p. 360:

> *Effect of Protest.* Generally, in the absence of a statutory provision otherwise, a payment cannot be recovered back as being compulsory or involuntary by reason of the mere facts that it is paid unwillingly and that the payor at the time of payment makes a protest against the payment. * * * [However,] where there is a controversy between persons, and money is paid in protest of its correctness and with the assurance of a suit for the recovery of all or a part of it *and that situation is assented to,* the amount is thereby

> left open to be adjudicated and the payment is not voluntary. Where a receipt taken for the money paid *expressly states that the payment is under protest and does not defeat the right to sue and recover* the money, it may be recovered back regardless of whether or not the facts amount to payment under duress. [Emphasis added]

It likewise appears that in the cases relied on by Richfield significant language relating to the necessity of *agreement* as to right of suit are omitted from the brief.

Thus, in *United States v. Ohio Oil Co.,* 163 F. 2d 633 (C.A. 10, 1947), certiorari denied 333 U.S. 833, the Court stated (pp. 636-637):

> When a dispute arose between the Secretary as lessor and the Ohio as lessee concerning the power and authority of the Secretary under the contract to fix and determine the minimum value of the royalty oil, *the disputants entered into a solemn agreement under which the Ohio delivered to the Secretary the amount in controversy, on the condition that it would be deposited in the treasury of the United States in a trust-fund receipt account* entitled "unearned moneys, lands (Interior Department) available for refund" as authorized by Section 19 of the Permanent Appropriations Repeal Act, 48 Stat. 1232, 31 U.S.C.A. § 725r. [Emphasis supplied]

In the case of *In Re New York, O. & W. R. Co.,* 178 F. 2d 765 (C.A. 2, 1950), there was also an express agreement under which the right was reserved to

apply to the Court to test the right to the money in question. It stated (p. 766):

> "In view of all the circumstances surrounding this situation, we are enclosing herewith check for $5259.84 representing the balance claimed by the Trustee, as per your letter of May 20, 1946, without prejudice and under protest. In this connection *we reserve the right to apply to the Court for a review of all of these bills and with the understanding that to the extent that such review shall determine there is any moneys due and owing to us by the Trustees, you will comply with such order as the Court may issue in connection* with our petition." [Emphasis supplied]

Again in *Lobit v. Marcoulides,* 225 S.W. 757 (Tex. 1920), relied upon by Richfield (Br. p. 22), there was an agreement as to the right to sue. This is pointed out by the Court (p. 759):

> Appellees then, in order to procure their loan, which they had negotiated at large expense, agreed to pay appellants the amount claimed by them, with the understanding that they paid it under protest, and *such payment should not prejudice their right to sue for its recovery. Appellants received the money under this express agreement, and so stated in the receipt and release executed by them to appellees.* [Emphasis supplied]

It may be noted that in quoting from the Court's opinion (p. 762) Richfield omits the significant language which follows immediately thereafter:

> *Having obtained the money from appellees under this express agreement,* appellants cannot

> claim that the payment was a voluntary one, and that appellees cannot recover the money which, under finding of the jury, they did not owe appellants, and it would be manifestly unjust to allow appellants to retain it. 21 Ruling Case Law, p. 143; U.S. v. Edmonston, 181 U.S. 500, 21 Sup. Ct. 718, 45 L. Ed. 978. [Emphasis supplied]

These instances are typical of all Richfield's cases and quotations.

The California decision in *Replogle v. Ray,* 48 Cal. App. 2d 291 (1941), is finally relied upon by Richfield (Br. pp. 22-23), because the agreement reserving the right to sue was not in writing (Br. p. 23). But there again the Court specifically found (p. 307)——

> * * * that *it was agreed between the parties at the time of said settlement* that their respective claims, which were made the subject of this litigation, should be reserved for future adjustment and settlement and that said claims should not be prejudiced by the settlement of the Air Way litigation. [Emphasis supplied]

The *Replogle* case, therefore, is clearly distinguishable from the case at bar. There was express agreement for suit.

In the present case, we find that Richfield and the Government, both represented by legal counsel, were not only dealing at arm's length but were preserving their respective positions for the record by means of letters carefully drafted by their lawyers. Obviously, there was no desire on either side to rely upon oral understandings by telephone. We submit, therefore,

that Richfield's cases only serve to prove that it cannot maintain this suit.

II.

THIS COURT'S PREVIOUS RICHFIELD DECISION ESTABLISHES THAT PAYMENTS UNDER THREAT OF WITHHOLDING AND OFFSET BY THE GOVERNMENT ARE VOLUNTARY AND NOT RECOVERABLE.

On Richfield's previous appeal, this Court has already resolved against Richfield the two contentions now repeated, (1 that payment under the Government's threat of witholding, setoff and suit amounted to seizure of its property and constituted duress, making payment involuntary (Br. 10-15), and (2) that it had the right to choose the lesser of the two evils by paying the Government under protest and suing the United States, rather than waiting for the United States to withhold and then sue (Br. 15-18). This Court's opinion on that case (207 F. 2d at 870-871) is completely dispositive of the only issues actually raised by Richfield's amended libel and the Government's exceptions and exceptive allegations. In rejecting Richfield's contention that withholding and setoff was duress, the Court there stated:

> Manifestly the appellant has adequate means for challenging the disputed contention as to the $75,000 and the asserted right of setoff by suing in the Court of Claims for the amounts due for petroleum products sold to the United States, should payments be withheld as threatened. This is the traditional remedy in such cases.
>
> * * * * * * *

> * * * the complaint is wholly wanting in any specification of facts which would disclose any duress under which appellant could have been acting. The assertion of duress is a mere conclusion. And the complaint shows conclusively, we think, that duress in a legal sense was wholly wanting.

The leading Supreme Court case is *Silliman v. United States,* 101 U.S. 465 (1879). There the Government threatened that all compensation would be withheld from a contractor unless he agreed to a new contract at a lower rate. The contractor agreed under protest, accepted payment at the lower rate and sued for the difference. In denying recovery to plaintiffs, Justice Harlan stated (pp. 470-471):

> They now seek the aid of the law to enforce their rights under the original charter-parties, upon the ground that those last signed were executed under such circumstances as amounted, in law, to duress. Duress of, or in, what? Not of their persons, for there is no pretence that a refusal, on their part, to accede to the illegal demand of the quartermaster's department would have endangered their liberty or their personal security. There was no threat of injury to their persons or to their property, to avoid which it became necessary to execute new charter-parties. Nor were those charter-parties executed for the purpose, or as a means of obtaining possession of their property. They yielded to the threat or demand of the department solely because they required, or supposed they required, money for the conduct of their business or to meet their pecuniary obligations to others. Their duty, if they expected to

> rely upon the law for protection, was to disregard the threat of the department, and apply to the courts for redress against its repudiation of a valid contract.

See also *Hartsville Oil Mill v. United States,* 271 U.S. 43 (1946) holding a threat to break a contract is not duress.

Richfield both now and on its previous appeal has asserted, however, that the Government threatened to seize its property when all that occurred was a threat of withholding, setoff and suit. Maritime's July 25, 1955 letter (Exhibit K at R. 24) makes this plain. This threat of setoff or suit is perfectly permissible as indicated in *United States v. Munsey Trust Co.,* 332 U.S. 234 (1947), where the Supreme Court explicitly recognized the Government's right to withhold and setoff against an amount admitted to be due a contractor under another contract. The Court stated (pp. 239-240):

> The government has the same right "which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in estinguishment of the debts due to him." *Gratiot v. United States,* 15 Pet. 336, 370; *McKnight v. United States,* 98 U.S. 179, 186. More than that, federal statute gives jurisdiction to the Court of Claims to hear and determine "All set-offs, counterclaims, claims for damages, whether liquidated, or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court . . ." Judicial Code

> § 145, 28 U.S.C. § 250 (2). This power given to the Court of Claims to strike a balance between the debts and credits of the government, by logical implication gives power to the Comptroller General to do the same, subject to review by that court.

So here Richfield could have sued if the Government offset or waited for the Government to sue it.

The lower court cases that refusal to pay is not duress are countless. In *Kingsbury v. United States,* 68 Ct. Cl. 680 (1930), a plaintiff who had agreed to a price reduction refused to refund the difference claiming duress, the Government withheld payments due him and he sued claiming an involuntary payment "under protest and duress." Citing *Silliman* and *Hartsville,* the Court rejected his claim, stating (p. 693):

> The only grounds which the plaintiff states as compelling him to sign the contract were "delayed payments, unpleasant controversy, and annoying, expensive interference with the normal conduct and development of [his] business." This, under the decisions, is not duress.

Compare *Holt v. Quaker State Oil Refining Co.,* 67 F. 2d 170 (C.A. 4, 1933); *Connolly v. Bouch,* 174 Fed. 313 (C.A. 8, 1909); *Fruhauf Southwest Garment Co. v. United States,* 111 F. Supp. 945 (Ct. Cl. 1953).

In *Vines v. General Outdoor Advertising Co.,* 171 F. 2d 487 (C.A. 2, 1948), where plaintiff's employer had threatened to withhold money due him for services already rendered, the Court said (p. 490):

> If the defendant threatened to repudiate the debt, the situation falls within the New York decisions which we have cited that such a repudiation "without more" is not duress; * * * on the other hand, if the defendant did not threaten to repudiate the debt, but merely made its cancellation a condition of the plaintiff's continuing in its employ, there was no shadow of duress in that.

So payment because of fear that the payee will discontinue dealing with plaintiff is not involuntary. *Detroit Edison Co. v. Wyatt Coal Co.,* 293 Fed. 489, 494 (C.A. 4, 1923); *Pure Oil Co. v. Tucker,* 164 F. 2d 945, 948 (C.A. 8, 1947); *Dennehy v. McNulta,* 86 F. 2d 825, 829 (C.A. 7, 1898), certiorari denied, 176 U.S. 683; *Brock v. Anderson-Prichard Oil Corp.,* 135 F. Supp. 579, 582 (W.D. Okla., 1955).

Because the Government's threat of withholding, setoff and suit did not constitute duress as a matter of law, Richfield's payment was voluntary and not recoverable. As the Court said in *Manhattan Milling Co. v. Manhattan G. & E. Co.,* 115 Kans. 712, 225 Pac. 86-91 (1924):

> It is elementary that the law does not recognize a privilege to pay an illegal demand and then to sue for the money. It is only when, in an emergency for which he is not responsible, a person finds he has no choice except to pay in order to protect his business interests that he may recover.

So in *United States v. Edmondston,* 181 U.S. 500 (1901), it appeared that plaintiff paid $200 more than the law required him to pay for the purchase of land

from the Government. In reversing judgment for plaintiff and remanding with instructions to enter judgment for the Government, the Court said (pp. 502-503):

> If the parties to the transaction were both private individuals, it would clearly be a case of voluntary payment, and the amount overpaid would not be recoverable. * * * But it is insisted that the relations between the government and its purchaser are not like those between two individuals —that there is a constraining power in the government, a species of force or compulsion in its action, which makes the payment of money by one purchasing land from it through its officers a payment not voluntary but an exaction, and therefore enables the purchaser to recover any excess in the price.
>
> We may not enter into any discussion of the mere equities of this transaction or the extent of the moral obligation resting on the government to repay a purchaser an excess in the price charged to and received from him. Our inquiry is limited to the question whether, in the statutes conferring jurisdiction on the Court of Claims, Congress has intended to acknowledge the liability of the government to every individual who has paid to any one of its officers a sum in excess of the legal charge for property or services and given to that court the power to render judgment against it for such excess.

The Court reviewed the authorities and concluded (pp. 510-511):

> It is clear from these references that this court has distinctly and constantly recognized the doc-

> trine that where there has been a voluntary payment of money, using that term in its customary legal sense, the money so paid cannot be recovered, and also that that doctrine applies to cases in which one of the parties is the government and that money thus voluntarily paid to the government cannot be recovered.

To the same effect see *Pure Oil Co. v. Tucker,* 164 F. 2d 945, 947-948 (C.A. 8, 1947); *Detroit Edison v. Wyatt Coal Co.,* 293 Fed. 489, 493-494 (C.A. 4, 1923).

That payment was under protest makes no difference. In *Union Pacific Railroad Company v. Dodge County Commissioners,* 98 U.S. 541, 543 (1879), the Supreme Court adopted as a correct statement of the rule a quotation from *Wabaunsee County v. Walker,* 8 Kan. 431 (1871), as follows:

> "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, *such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary.*" [Emphasis supplied.]

Similarly in *Chesebrough v. United States,* 192 U.S. 253 (1904), suit was brought to recover $600 paid for Internal Revenue stamps which plaintiff purchased from the Government and attached to a deed. The claim made was that the stamps were purchased and

affixed under duress and the law requiring their use was unconstitutional. The Supreme Court held the payment voluntary and not recoverable, saying at pages 259-260:

> * * * generally speaking, even *a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power* possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment. *Little v. Bowers,* 134 U.S. 547, 554; *Railroad Company v. Commissioners,* 98 U.S. 541, 544; *Radich v. Hutchins,* 95 U.S. 210. * * * [Emphasis supplied]

Thus, it is submitted, Richfield has no right to recover back its compromise payment. Neither the threat of withholding, set off and suit nor the making of protest at the time of payment will serve to render the payment involuntary and recoverable.

CONCLUSION.

For the foregoing reasons, we believe it is clear (1) that the pertinent written correspondence, all of which is in the record, shows libelant Richfield made a voluntary payment under protest of the compromise amount, (2) that no prior telephonic agreement for payment with right of suit for recovery back may be proven under the amended libel, and (3) that payment under

the alleged threat of withholding, offset and suit did not constitute duress so as to permit suit for recovery back. The dismissal of the amended libel by the Court below should accordingly be affirmed.

Dated, December 28, 1956.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Attorneys, Admiralty and Shipping Section,
Department of Justice,

Attorneys for Appellee.
United States of America.

GRAYDON S. STARING,
GEORGE JAFFIN,
Of Counsel.